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No. 92-1804

In the Supreme Court of the United States

OCTOBER TERM, 1993

WILLIAM A. BARCAL, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for mail fraud.

2. Whether the government prosecuted petitioner vindictively when it added him to a RICO conspiracy count of a superseding indictment after he declined to plead guilty to other offenses charged in an earlier indictment.

3. Whether the district court abused its discretion in denying petitioner's motion for a severance.

4. Whether the trading-by-offset provision of the Commodity Exchange Act, 7 U.S.C. 6b(1)(D), is unconstitutionally vague as applied in this case.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-51) is reported at 979 F.2d 469. The opinion of the district court declining to dismiss certain counts of the indictment is reported at 768 F. Supp. 1256. A related opinion of the district court is reported at 768 F. Supp. 1277.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1992. A petition for rehearing was denied on January 6, 1993. Pet. App. 52. The petition for a writ of certiorari was filed on April 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on charges of mail fraud, in violation of 18 U.S.C. 1341; making false entries on contracts for the sale of soybeans, in violation of the Commodity Exchange Act, 7 U.S.C. 6b(1)(B); filling customer orders for soybean contracts by offset, in violation of 7 U.S.C. 6b(1)(D); and cheating and defrauding a person for whom he made a soybean contract, in violation of 7 U.S.C. 6c(a)(3)(A). He was sentenced to eight months' imprisonment, to be followed by three years of supervised release, and ordered to pay $1,662.51 in restitution. See 768 F. Supp. 1277. The court of appeals affirmed petitioner's conviction and sentence. Pet. App. 1-51.

1. Petitioner was a floor trader in soybean futures contracts at the Chicago Board of Trade (CBOT). Under federal law and regulations and CBOT rules, all trading must take place in a tiered trading "pit" between the hours of 9:30 a.m. and 1:15 p.m. The trades must be conducted, and all customer orders executed, in the marketplace of the pit by "open outcry." That means that a trader seeking to buy or sell (whether for himself or for a customer) must bid (ask to buy) or offer (ask to sell) audibly and openly in the pit where other traders are located so that anyone in the pit has an opportunity to accept the bid or offer. After an offer is accepted, the traders record on trading cards or order forms the details of the trade, including the price, the amount of the commodity, the identity of the opposing trader, and the time of the trade. The traders return the cards and orders throughout the day to clearing firms and to the

CBOT, which collects information and compares both sides to see if they match up or "clear." If they do not match, an "out-trade" occurs, which leaves the trader with an unfilled bid or offer, and thus the risk of a loss if the market has changed adversely since the time the trade was made. If the parties can identify which trader made the mistake, that trader bears any loss; if they cannot, the traders typically split the loss evenly. The customer does not bear any loss resulting from an out-trade, although the customer receives any profit that arises if the market moves favorably before the mistake is corrected. Pet. App. 2-4; see generally Gov't C.A. Br. 1-4.

Brokers are required to use the outcry system to obtain the best price available for their customers in the market. Petitioner and his co-defendants engaged in several practices that deprived their customers of the right to have competitive bidding determine the price at which their orders would be filled. The most common of those practices involved the "matching" of customer buy and sell orders at a guaranteed profit to the traders. In a "match," a broker would cooperate in granting a profit to a floor trader by selling an order to the floor trader on behalf of a selling customer at a lower price than the price the broker accepted in a simultaneous purchase from the same floor trader on behalf of one of the broker's buying customers. Hence, customers whose orders should have been filled at prices selected by the market had their orders filled at prices selected by the broker. Also, because the traders retained the profits from such transactions, profits the customers would have earned in the open market were diverted. The traders frequently executed those fraudulent trades after the pit was closed, and then recorded a false time on the

trade card or order form so that it would appear that the trade occurred during the hours of competitive bidding in the pit. After the trade was executed, a clearing firm mailed or wired a statement to the customer confirming the execution of the trade. Pet. App. 4-5; see Gov't C.A. Br. 4-9, 13-16.

2. The original indictment charged petitioner and several others with violations relating to fraudulent trading practices in the soybean pit. Although the indictment included a count charging RICO conspiracy, petitioner was not named in that count. After petitioner pleaded not guilty, a grand jury returned superseding indictments that added charges, reduced the number of defendants, and added petitioner to the RICO conspiracy count. Before trial, the district court denied petitioner's motion to dismiss the RICO conspiracy count. 768 F. Supp. at 1265-1266. The court rejected petitioner's argument that the government had added him to the RICO count to punish him for pleading not guilty. Instead, the court found that new information provided by cooperating traders prompted the revision of the RICO conspiracy charge, noting that other defendants who (like petitioner) declined to plead guilty were not added to the RICO count as additional defendants. *Id.* at 1266. The jury subsequently acquitted petitioner on the RICO conspiracy count. See Pet. App. 40 n.13.

The district court also denied motions to dismiss the mail fraud counts, holding that the jury could find that the confirmation mailings were essential to the success of the scheme to defraud because the statements did not report that the trades had been conducted in an illegal manner. 768 F. Supp. at 1271-1274. The court explained the adverse consequences for the scheme if the confirmation mailings had

accurately reported the unlawful manner in which the trades were executed:

> (1) the customers who placed the orders might not have placed any more orders with the brokerage firms whose brokers executed the trades illegally, (2) the affected brokerage firms might have been unhappy with such an occurrence and might have fired the brokers who executed the orders, and (3) the scheme to defraud would have abruptly ended because each of the perpetrators would have been apprehended.

Id. at 1273. The district court also rejected a claim that the fill-by-offset provision of the Commodity Exchange Act, 7 U.S.C. 6b(1)(D), was void for vagueness. 768 F.2d at 1276.

3. The court of appeals affirmed petitioner's convictions on all counts. Pet. App. 1-51.

a. As to the mail fraud convictions, which were predicated on trades made by "matching" rather than through competitive bidding in the pit, the court rejected petitioner's argument that the requisite mailings did not advance the scheme to defraud. Pet. App. 15-19. The court noted that the CBOT rules required the parties to mail or wire a statement to customers confirming the price of the trade. Relying on *Schmuck* v. *United States*, 489 U.S. 705 (1989), the court held that the mailings did not have to be an "essential element of the scheme"; instead they were sufficient if they were "incident to an essential part of the scheme, or a step in the plot." Pet. App. 17 (quoting *Schmuck*, 489 U.S. at 710-711). In this case, the mailings "furthered the scheme by lulling customers into believing that nothing was wrong with the execution of their orders." Pet. App. 18.

Although the confirmations accurately stated the price at which each purchase or sale was made, they were "far from accurate" because they "served as representations that the trades had been executed in the open market." *Ibid.* As the court noted, "[t]he customers who testified at trial stated they expected their orders to be filled in the market at the best price available, and had no idea that the prices they received had been fraudulently selected for them by the traders." *Ibid.*

The court rejected petitioner's reliance on *United States* v. *Maze*, 414 U.S. 395 (1974); *Parr* v. *United States*, 363 U.S. 370 (1960); and *Kann* v. *United States*, 323 U.S. 88 (1944), explaining that those cases involved mailings made after fruition of the scheme that were "little more than post-fraud accounting." Pet. App. 15-19. In contrast, "the fraudulent activities of the [traders in this case] depended upon a smooth flow of executed orders from traders on the CBOT floor to the public customers." *Id.* at 18. Furthermore, the mailings helped petitioner and his co-defendants conceal the ongoing scheme (*ibid.*):

> [The mailed confirmations] led customers to believe that the broker had attempted to obtain the best price available in the market; they prevented customers from complaining that they were not getting appropriate execution of their orders, and, perhaps most importantly, they maintained the defendants' positions of trust as brokers and traders on the CBOT.[1]

[1] Judge Cudahy concurred in part and dissented in part on the mail fraud question. Pet. App. 46-50. Judge Cudahy agreed with the majority that under circuit precedent the confirmation mailings were adequate to support the mail fraud

b. The court of appeals also rejected petitioner's argument that the prohibition on trading by offset in Section 6b(1)(D) of the Commodity Exchange Act, 7 U.S.C. 6b(1)(D), is unconstitutionally vague as applied in this case. Pet. App. 29-30. That statute makes it unlawful for traders on a contract market (such as the CBOT), "in connection with any order to make * * * any contract of sale of any commodity in interstate commerce * * * for or on behalf of any other person * * * to fill such order by offset against the order or orders of any other person." The court noted that petitioner and his co-defendants "offset their customer orders without entering the competitive marketplace through open outcry," and thus concluded that their "matching of orders fell within the core of the statute's prohibition." *Id.* at 30.

c. The court also rejected petitioner's claim that the district court improperly denied his motion for a severance. Pet. App. 38-39. The court did not accept

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convictions. He expressed concern, however, that the "lulling" rationale relied on by the majority "knows no real limits." *Id.* at 50.

Judge Cudahy also faulted the majority for failing to distinguish between non-competitive trades that resulted in a surplus and those that did not. Pet. App. 46-49. He noted that "the vast majority" of the mail fraud convictions of the ten appellants involved "an identifiable surplus, as to each appellant, applied for a purpose other than the customer's benefit." *Id.* at 49. As to those "few" trades that did not involve a surplus, Judge Cudahy would not have affirmed the mail fraud convictions. *Ibid.* Petitioner does not claim that his mail fraud convictions were among the "few" that did not involve a surplus, and he does not rely on that portion of Judge Cudahy's opinion.

petitioner's argument that his defense was antagonistic to the testimony of co-defendants Bradley Ashman and Edward A. Cox, III, because "[n]either Ashman nor Cox admitted to fraud, nor did they accuse [petitioner] of any crime." *Id.* at 39. Moreover, the court observed that the jury acquitted petitioner on one count charging RICO conspiracy, on three counts charging false record violations, on one count charging fill-by-offset trading, and on one count charging accommodation trading. *Ibid.* Therefore, the jury's verdict made clear that petitioner was not "lost in the crowd of co-defendants." *Ibid.*

d. Finally, the court found no support in the record for petitioner's claim that "the prosecution violated his due process guarantees by vindictively charging him with RICO conspiracy in superseding indictments after he pleaded not guilty to the original indictment." Pet. App. 39-40 n.13. In any event, the court held, petitioner's claim was moot because the jury acquitted him of the RICO conspiracy charge. *Ibid.*

ARGUMENT

1. Petitioner's principal contention (Pet. 14-29) is that 18 U.S.C. 1341 did not apply to his fraudulent scheme because the government failed to establish that the mail was used "for the purpose of executing" that scheme.

The required nexus between the mailing element of a mail fraud violation and the scheme to defraud is well established. The mailing must be part of the execution of the fraud, but the mailing need not be an essential element of the scheme. *Schmuck* v. *United States*, 489 U.S. 705, 710 (1989). Instead, it is sufficient for the mailing to be "incident to an essential

part of the scheme" or "a step in [the] plot." *Id.* at 710-711 (internal citations omitted; brackets in original). Petitioner to the contrary, *Schmuck* controls the disposition of this case. In *Schmuck*, the defendant purchased used cars, rolled back their odometers, and sold them to retail dealers at prices that were artificially inflated as a result of the low-mileage odometer readings. The retailers resold the cars (again at inflated prices resulting from the rolling back of the odometers) and then mailed title-application forms to the Wisconsin Department of Transportation on behalf of the retail customers. *Id.* at 707. In holding that the title-application mailings adequately established use of the mails, the Court emphasized that Schmuck's operation was an ongoing fraudulent venture in which he sold multiple cars over a period of years to the same dealers. *Id.* at 711-712. Consequently, "the success of Schmuck's venture depended upon his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their Wisconsin customers." *Ibid.* For that reason, the scheme "did not reach fruition until the retail dealers resold the cars and effected transfers of title." *Id.* at 712.

Likewise here, the scheme to deprive soybean futures customers of contracts traded competitively in the pit through "outcry" was an ongoing fraudulent venture. Traders routinely covered their losses through the forbidden practice of matching trades rather than filling orders through competitive bidding in the open market. The success of the scheme depended upon the brokers' continued good relationship with the brokerage firms and the customers. The mailed confirmations implicitly repre-

sented to the customers that their orders were executed in conformity with federal law and CBOT rules, that is, through competitive bidding. In fact, the mailings here were more closely tied to the scheme than were the mailings in *Schmuck*. In this case, customers engaged brokers, such as petitioner, to buy and sell soybean futures contracts on their behalf. The mailings to the customers confirmed that the brokers had executed the trades as agreed. Although petitioner did not personally mail the confirmation statements to his customers, the statements were generated directly by petitioner's trades. In *Schmuck*, by contrast, the mailings were one step removed from the defendant's misconduct, because they were generated by the resale of cars that defendant Schmuck had fraudulently purveyed.

Nor can petitioner avoid the reach of the mail fraud statute by arguing (Pet. 19-21) that the confirmation mailings were "required by law." The retailers of Schmuck's used cars were required by law to obtain Wisconsin titles for their customers (*Schmuck*, 489 U.S. at 707), yet this Court held that the title-application mailings were sufficient to establish mail fraud. *Id.* at 715. Likewise, contrary to petitioner's argument (Pet. 21-23), it is no defense to mail fraud that the mailings accurately reported the price of the trade. As the Court stated in *Schmuck*, 489 U.S. at 715, mailings "that contain no false information * * * may supply the mailing element."

Contrary to petitioner's argument (Pet. 18-19, 25-28), the decision below does not conflict with *Kann* v. *United States*, 323 U.S. 88 (1944); *Parr* v. *United States*, 363 U.S. 370 (1960); or *United States* v. *Maze*, 414 U.S. 395 (1974). The defendants in *Kann* embezzled corporate profits by causing the corporation to

issue checks payable to them. After the defendants cashed the checks at a local bank, the bank mailed the checks to the drawee bank for collection. The Court found those mailings insufficient to sustain a mail fraud conviction because the scheme had already reached fruition, and it was "immaterial to the [defendants], or to any consummation of the scheme, how the bank which paid or credited the check would collect from the drawee bank." 323 U.S. at 94. Both *Parr* and *Maze* involved the unauthorized use of a credit card to purchase goods and services. In both cases, the Court found that subsequent mailings by the vendors of the credit card invoices "were not in execution of the scheme as required by the statute because it was immaterial to the defendants how the [vendors] went about collecting [their] payment." *Schmuck*, 489 U.S. at 713. As in *Kann*, the defendants' schemes in *Parr* and *Maze* had "reached fruition" when the defendants used the cards; the "success of [their] scheme[s] in no way depended on the mailings." *Schmuck*, 489 U.S. at 714.

In contrast, the success of petitioner's scheme depended on his maintaining the appearance of lawful trading by mailing statements to his customers confirming the executed trades. "[A] failure [to send the confirmation statements] would have jeopardized [petitioner's] relationship of trust and goodwill with the [brokerage firm and its customers] upon whose unwitting cooperation his scheme depended." *Schmuck*, 489 U.S. at 714. Accordingly, the confirmation mailings were sufficient to establish the mailing element of the mail fraud counts.[2]

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[2] Petitioner also complains that by converting Commodity Exchange Act violations into mail fraud, the lower courts per-

2. Petitioner next contends (Pet. 29-38) that the government charged him with RICO conspiracy to punish him for pleading not guilty to the mail fraud and Commodity Exchange Act charges in the original indictment. Because the remedy for any such action would be dismissal of the RICO count, the jury's acquittal of petitioner on the RICO count deprives that contention of any significant force. Although petitioner suggests (Pet. 38) that he is entitled to dismissal of all the counts on which he was convicted, that suggestion rests on the notion that the trial court erred in denying his motion for a severance, a contention we discuss below. In any event, as the district court found, the government's decision to include petitioner in the RICO charge in the superseding indictment was prompted by the receipt of additional information from cooperating witnesses. The omission from the RICO count of other defendants who (like petitioner) declined to plead guilty is particularly damaging to petitioner's account of the government's motivation. See 768 F. Supp. at 1265-1266. There simply is no support in the record for petitioner's claim of vindictiveness.

3. Petitioner also claims (Pet. 38-47) that he was entitled to a severance because he and two of his co-defendants had antagonistic defenses. But "[m]utually antagonistic defenses are not prejudicial *per se*," and they do not automatically entitle a defendant to a severance. *Zafiro* v. *United States*, 113 S. Ct.

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mitted use of the RICO statute to punish "activities Congress never intended to punish as felonies, let alone as racketeering." Pet. 17; see Pet. 26 n.3. Whether or not that argument has merit, it does not help petitioner because he was not convicted of any RICO violations.

933, 938 (1993). Ultimately, the trial court must assess the risk of prejudice to the defendant, and the mere fact that a co-defendant may inculpate him is not sufficient to establish unfair prejudice. *Ibid.* Accordingly, petitioner's claim reduces to an argument that the trial court erred in making that assessment on the facts of this case.

The court of appeals correctly upheld the district court's ruling. First, as the court of appeals found (Pet. App. 39), petitioner's co-defendants denied engaging in a scheme to defraud, and they did not directly accuse petitioner of any crime (although they did, as petitioner suggests, Pet. 40-43, state that petitioner violated rules of the CBOT). But, as this Court noted in *Zafiro*, adverse testimony from a co-defendant is not sufficient to constitute unfair prejudice unless it somehow distorts the truth-finding function of the trial. *Zafiro*, 113 S. Ct. at 938. In addition, as the court of appeals indicated (Pet. App. 39), the mixed verdict of acquittals and convictions strongly suggests that the joinder of defendants did not have a "substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946). Hence, there is no basis for assuming that petitioner's severance claim presents any legal question of general significance.

4. Finally, petitioner contends (Pet. 47-54) that the trading-by-offset provision of the Commodity Exchange Act is unconstitutionally vague. Because the Act does not touch on First Amendment freedoms, petitioner's "claim must be evaluated as the statute is applied to the facts of this case." *Chapman* v. *United States*, 111 S. Ct. 1919, 1929 (1991). Section 6b(1)(D) of the Act makes it unlawful for commodities traders

operating in a contract market "to fill [orders] by offset against the order or orders of any other person." Although petitioner suggests that the language is unclear, it quite clearly applies to the conduct at issue in this case: petitioner, without entering the competitive market, filled his customers' orders by offsetting them against orders held by another participant in the market. Accordingly, petitioner's vagueness claim is meritless.[3]

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[3] Petitioner errs in relying (Pet. 51-52) on the determination of the Commodity Futures Trading Commission (CFTC) that it will permit exchanges to adopt procedures for the competitive execution of large orders without open outcry. See 56 Fed. Reg. 12,336 (1991) (promulgating amendments to 17 C.F.R. 1.39(b)). The CFTC's determination that the market for extremely large orders would function better in certain cases without open outcry—and thus that competitive trades conducted in accordance with those procedures were not proscribed by the anti-offset provision of the Commodity Exchange Act—offers no support for the suggestion that petitioner's prearranged and noncompetitive trades do not fall within the core of the statutory prohibition. For the same reason, petitioner errs in relying (Pet. 51) on *Nichols & Co.* v. *Secretary of Agriculture*, 136 F.2d 503, 505 (1st Cir. 1943). As the court of appeals explained in this case (Pet. App. 30), *Nichols* stated only that it might be impermissible to prosecute a trader who made a competitive trade by open outcry; petitioner's trades, of course were neither competitive nor made by open outcry. Accordingly, *Nichols* does not further his argument.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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